to fight under the banner under which he had enlisted, and yet he was "not ashamed of the gospel of Christ," and, both by precept and example, set forth the true and living faith that was in him. He was regular in his attendance upon the services of his church, firm in his faith, unfaltering in his devotion, and liberal in his support. He was conservative in his views, and wise in his counsel. His sweet, gentle disposition, sanctified by a living faith, made his life and character a benediction to all about him, and a pillar of strength in his parish.

Upon his domestic life, the public has no right to gaze; but, without invading those hallowed precincts, we know that the spirit that was so sweet and gentle in public was not austere at the fireside, and that the "indescribable something" which so attracted his fellowmen, made home the sweetest place on earth to his family.

Sincere in his friendship, wise in his counsel, just in his judgment and humble in his faith, he died, honored and respected by all who knew him.

M. P. BURKS.

FOREIGN CORPORATIONS DOING BUSINESS IN VIRGINIA.

VIRGINIA CODE, SECTIONS 1104–1105.

Section 1104 of the Virginia Code provides that every company incorporated under the laws of another State shall, before commencing business in this State, establish an office in the State, appoint a resident agent, on whom process against the company may be served, and record its charter and the power of attorney to its agent in the county where the office is located.

Section 1105 reads as follows:

"The officers, agents and employees of any such company doing business in this State, without complying with the provisions of the preceding section, shall be personally liable to any resident of the State having a claim against such company, and, moreover, service of process upon either of said officers, agents, or employees, shall be deemed a sufficient service on the company."

The purpose of these statutes is to furnish easily accessible evidence of the existence of foreign corporations, and to protect residents of this State in dealing with them. If the foreign corporation complies with these statutes, well and good, but if it fails to comply, and the occa-

sion arises to use and rely on these statutes, we find that the protection they afford is far from complete.

I. *What constitutes "doing business" in this State?*

Contracts are made every day by residents with foreign corporations through their "drummers." It is well settled that statutes of this nature have no reference to itinerant salesmen, but only to those corporations which migrate into the State and do business here through resident or local agents.

Isolated transactions are not construed as a doing or carrying on of business within the State. Moreover, while a State may impose conditions on a foreign corporation (not an agency of the United States), or prevent altogether its migrating into the State and settling there, it cannot interfere with the right of a foreign corporation any more than it can with the right of an individual, to send its agents into the State for the purpose of trade and commerce. To do so would be to come in conflict with the commerce clause of the Federal Constitution and the interstate commerce acts.[1]

The business of *insurance* is not commerce. It is competent, therefore, for any State to impose such restrictions upon foreign insurance companies as may seem desirable, and if such companies cannot comply with the conditions they must keep out.[2] Foreign insurance companies have special provision made for them in our Code.[3]

II. *Effect of non-compliance, upon validity of contracts.*

It is settled that a State may prescribe any terms it sees proper (not repugnant to the Constitution and laws of the United States) upon which a foreign corporation may enter and do business within its limits.[4] It may declare that contracts made without compliance with the statutes shall be void; if they are declared "void," or "unlawful," or are prohibited by the statute, they may be enforced against, but cannot be enforced by, the corporation. The same is true where the prohibition of the statute is unaccompanied by any specific penalty, since, in such cases, this is the only way in which the prohibition can be enforced.[5]

[1] 6 Thompson on Corp., sec. 7936; 17 Am. & Eng. Enc. L. (2d ed.), 66, 105. See Gunn *v.* White Sewing Machine Co. (Ark.), 20 S.W. 591, 18 L. R. A. 206, 33 Am. St. Rep. 223. For instances of what does, and what does not, constitute a doing of business, see 13 Am. & Eng. Enc. L. (2d ed.) 870.

[2] 6 Thompson on Corp. 7949; 13 Am. & Eng. Enc. L. (2d ed.) 871; Hooper *v.* California, 155 U. S. 648.

[3] Chapter 53.

[4] St. Clair *v.* Cox, 106 U. S. 350, 356; 13 Am. & Eng. Enc. L. (2d ed.) 860.

[5] 6 Thompson on Corp. 7950, 7960; 13 Am. & Eng. Enc. L. (2d ed.) 875, 877, 878.

But the contract must be declared void by express language, or such must be the intent of the legislature, otherwise it will not be invalidated.[1]

Our statute does not expressly invalidate contracts made in this State by non-complying foreign corporations. The corporation is commanded to do certain things, and, in event of non-compliance, its officers, agents and employees are made personally responsible for its debts. This is the consequence, and the only consequence, attached to the failure of the corporation to comply with the statute.[2] As was said by the Supreme Court of Colorado,[3] in reference to a similar statute, "the courts cannot very well go further than the legislature."

III. *Enforcing the statutory penalty against officers, agents and employees in an original proceeding, beyond the State.*

Some of our sister States, New Jersey for instance, have passed statutes exempting officers and stockholders from proceedings in their courts to enforce any statutory personal liability, whether penal or contractual, created by the laws of any other State. It would be useless of course to attempt to enforce the liability arising under sec. 1105 of our Code, in the State of New Jersey.

When there is no such statute controlling the matter, it is a question whether the liability imposed by our statute can be enforced in the courts of a sister State, at least in an original suit. In the reported cases involving similar statutes, the question seems to have turned on whether the liability should be deemed *penal* or *contractual*. If the liability imposed by statute be penal it must be enforced, if at all, in the State which imposed it—if contractual it can be enforced in the courts of any State.[4]

A similar question has arisen in suits brought to enforce in another State statutes imposing a liability on stockholders beyond the amount of their stock subscription. When the subscription is made in face of a statute imposing on the subscriber a contingent liability to creditors, of, say, double the amount of his stock, he may well be said to subscribe with reference to this statute, and the statute becomes a part of his contract. In other words, the liability is contractual. There

[1] 6 Thompson on Corp. 7957, and note; Edison Gen'l Electric Co. *v.* Canada Pacific Nav. Co. (Wash.), 24 L. R. A. 315, and note.

[2] Nat. Mutual etc. Ass'n *v.* Ashworth, 91 Va. 706, 1 Va. Law Reg. 519, and note.

[3] Helvetia Swiss Fire Ins. Co. *v.* Edward P. A. Co. 53 Pac. Rep., 242. See also Toledo Tie & Lumber Co. *v.* Thomas (W. Va.), 11 S. E. 37, 38; Thompson on Corp. 7958; 13 Am. & Eng. Enc. L. (2d ed.) 875.

[4] Minor's Confl. Laws, sec. 10.

seems to be little difference of opinion in cases involving this point; the liability will be enforced in the courts of any State.[1]

A different rule prevails where an effort is made to enforce in another State a liability imposed by statute upon a class of persons, such as officers or stockholders, for failing to perform some duty required by statute. The rule is clear that no country or State will enforce the penal or criminal laws of another State or country. This rule is not confined to laws for the punishment of crimes, but extends as well to statutes which impose penalties for the neglect or failure to perform certain duties or obligations imposed by law. Statutes, like the one in question, are usually construed to be penal, and the liability they impose will not be enforced in the courts of other States.[2]

While this rule may be regarded as established, it has not passed without criticism, and the criticism seems just. In *Attrill* v. *Huntington*,[3] Judge Stone delivered a dissenting opinion, in which he said:

"It is not very easy to give any brief definition of a criminal law. It may perhaps be enough to say that, in general, all breaches of duty that confer no rights upon an individual or person, and which the State alone can take cognizance of, are in their nature criminal, and that all such come within the rule. But laws which, while imposing a duty, at the same time confer a right upon the citizens to claim damages for its non-performance, are not criminal."

This case was an action on a judgment, and not an original proceeding in a sister State, but the reasoning of Judge Stone would seem to be as well applicable to an original suit as to a suit on a judgment. The case was appealed and reversed by the Supreme Court of the United States,[4] where the court said (p. 676):

"As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign State or country."

Again, p. 679:

"It is true that the courts of some States, including Maryland, have declined to enforce a similar liability imposed by the statute of another State. But in each

[1] Cook on Stock and Stockholders (3d ed.), sec. 223; 2 Morawetz on Corp., sec. 610.

[2] Cook on Stock and Stockholders (3d ed.), 223; 3 Thompson on Corp. 4166; 2 Morawertz on Corp. 611; note to Attrill v. Huntington (Md.), 14 Am. St. Rep. 350.

[3] *Supra.*

[4] Huntington v. Attrill, 146 U. S. 657.

of those cases it appears to have been assumed to be a sufficient ground for that conclusion, that the liability was not founded in contract, but was in the nature of a penalty imposed by statute; and no reasons were given for considering the statute a penal law in the strict, primary and international sense." [1]

The case last cited has established the rule that after the original liability has passed into judgment in one State, the courts of another State, when asked to enforce it, are bound to give full faith and credit to that judgment, and if they do not, their decision may be reviewed and reversed by writ of error to the Federal courts. In such case the Federal court must decide for itself the nature of the original liability. In the case last mentioned, the Supreme Court held that a statute making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is not a penal law in the international sense. If that be so, it is hard to see how our statute could be construed as penal.

If a suit on the original liability imposed by our statute be brought in the court of another State, the question cannot be reviewed by the Supreme Court of the United States.[2] If the State court therefore should follow the old line of decisions, and construe the statute as penal, the plaintiff would be without remedy. He must either get into the Federal courts, or else recover judgment in his own State, and, if the courts of a sister State refuse to recognize it, appeal to the Federal court under the "full faith and credit" clause of the Constitution and the laws of the United States involving that clause of the Constitution.

IV. *Enforcing, beyond the State, a judgment recovered in this State against officers and agents.*

Wisconsin v. *Pelican Ins. Co.*[3] is usually cited as authority for the principle that, even after judgment recovered, the courts of another State will refuse to enforce it if it arose under a penal statute. This suit was brought upon a judgment recovered by the State of Wisconsin in one of her own courts against the defendant company for penalties imposed by a statute of Wisconsin for not making returns to the insurance commissioner of the State, as required by that statute. The court said (p. 290):

"The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but

[1] See criticism of this case in Minor's Confl. Laws, sec. 10.

[2] Same case, p. 683.

[3] 127 U. S. 265.

to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. . . . The application of the rule to the courts of the several States and of the United States is not affected by the provisions of the constitution and of the act of Congress, by which the judgments of the courts of any State are to have such faith and credit given to them in any court within the United States as they have by law or usage in the State in which they were rendered. . . . The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it: and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

There is no question but that a judgment based upon a penal statute, when the penalty accrues to the State, cannot be enforced beyond its jurisdiction.[1] The difficulty is in determining what liabilities are in their nature penalties. Liabilities imposed by statutes similar to ours have usually been construed as penalties, and, according to that view, judgments based thereon could no more be enforced beyond the State than could an original action. The Supreme Court of the United States has, however, in the comparatively recent case of *Huntington* v. *Attrill*,[2] before referred to, gone into the question of what are and what are not penal statutes, and held that the refusal of the courts of one State to give effect, within its limits, to the judgment of a sister State, based upon a statute which was not penal *in the strict, primary and international sense* of the word, is a refusal to give full faith and credit to the judicial proceedings of another State, as required by the constitution of the United States.

If a sister State, therefore, should refuse to enforce a judgment recovered in this State under our statute, a writ of error would lie to the Federal courts, which would determine, in the light of *Huntington* v. *Attrill*, whether our statute be penal in the international sense of the word.

V. *Can the liability imposed by the statute on officers, agents and employees be sustained in a suit brought in this State?*

Section 1105 provides that the officers, agents and employees of the non-complying company shall be personally liable to any resident of

[1] 18 Am. & Eng. Enc. Law (1st ed.), 272; note to Attrill *v.* Huntington, 14 Am. St. Rep. 350.

[2] 146 U. S. 657.

the State having a claim against such company. Similar statutes in other States impose this liability on officers, agents and members (shareholders). Our statute relieves the members and imposes the liability on the employees.

If the creditor can serve process on an *officer* in the State, a valid judgment could doubtless be obtained against him. It is the duty of corporate officers to see that their company complies with the requirements of law before commencing business in this State. An officer is usually both an agent of the corporation and a stockholder, and it is settled that a State may exclude the corporation altogether, or attach conditions to its doing business within its limits; it may ignore the corporation and treat its members as partners.[1]

An *agent* negotiating the business of the corporation might also be held liable under the statute; at least a number of similar statutes have been upheld against agents.[2]

"An *employee* is one who is employed. The term means one who works for an employer; a person working for a salary or wages; applied to any one so working, but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a government or corporation, or to domestic servants."[3]. It may be quite proper to hold the stockholders liable as partners, but it is certainly a hard case on an employee, who is probably ignorant of corporation law, and is merely employed in sawing wood or digging minerals, to hold him liable for corporate debts. Perhaps it would be too severe a test to hold that all of our unjust statutes are invalid, but in this case the employee has no control over the corporation, he probably knows nothing about the corporate contracts, and occupies no contractual relation whatever to the creditor except what might be implied from this statute. Whether his liability could be defeated on this ground is a question which the writer has been unable to solve to his satisfaction.

VI. *Is process served on an agent or employee, in a suit against the corporation, sufficient to justify personal judgment against the corporation?*

Service of process on an *officer* of the corporation, under the circumstances contemplated by the statute, is recognized as sufficient. The same may be said of service on an *agent*, at least when the action grows out of, or is connected with, the agency. The theory is that an

[1] 13 Am. & Eng. Enc. Law (2d ed.), 860.

[2] See 13 Am. & Eng. Enc. Law (2d ed.), 883, and note.

[3] 11 Am. & Eng. Enc. Law (2d ed.), 5 and note.

agent who is good enough agent to represent the corporation in making and taking contracts within the State is a good enough agent to impart notice to it of an action to enforce those contracts.[1]

No case has been found involving the sufficiency of service on a mere *employee.*

It is settled that the legislature of a State may, in the exercise of its power to impose conditions upon foreign corporations doing business within the State, prescribe a mode of service of process upon them which will subject them to its jurisdiction, provided such mode is not unreasonable, or contrary to the principle of natural justice which forbids condemnation without opportunity to be heard. And such a corporation, by doing business within the State, will be deemed to have assented to that mode of service, and will be bound thereby.[2] Service on an officer or agent may be sufficient, because they, in a manner, represent the corporation, but a mere employee has no representative character, nor have some subordinate agents; and the question is whether service on them in a suit against the corporation is due process of law.

The object of serving process is to give notice to the party, so that he may be made aware of and be able to resist the claim asserted against him. When this has been substantially done, so that the court may feel confident that service has reached the corporation, everything has been done that is required. But the service must be such as may reasonably be expected to give the notice aimed at.

In *Connecticut Mut. L. Ins. Co.* v. *Spratley,*[3] judgment had been recovered under a statute providing that "process may be served upon *any agent* of said corporation found within the county where the suit is brought, *no matter what character of agent such person may be.*" The judgment was attacked upon the ground that it was taken without valid service of process. The Tennessee Supreme Court states the general rule to be, that if the person served sustain sufficient rank to render it reasonably certain that the corporation would be apprised of the service, the demand of natural justice will be satisfied. The court refused to assume that the legislature intended to disregard this principle of natural justice, and construed the statute to contemplate only such persons as might reasonably be deemed to represent the corporation.

[1] 6 Thompson on Corp. 7519, 8024, 8029.

[2] See note to Pinney *v.* Providence L. & I. Co., 50 L. R. A. 589-594, and cases cited.

[3] (Tenn.), 44 L. R. A. 442.

This case went to the Supreme Court of the United States,[1] where the test applied was whether the agent served was sufficiently representative in his character for the law to imply to him the power to receive service of process.

St. Clair v. *Cox*[2] was a decision involving the validity of a statute of Michigan authorizing service of process on *any officer*, member, clerk, *or agent* of a non-resident corporation failing to comply with the statute. It did not appear from the record that the business had been transacted in the State, and the suit failed for that reason; the court, however, said, in reference to service on an agent:

"A certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered in evidence in another State, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employee, or to a particular transaction, or that his agency had ceased when the matter in suit arose."

Judge Thompson suggests that even should the courts of one State recognize service on a mere agent or employee as valid, the conclusiveness of the judgment, as an instrument of evidence in other States, might be a different question.[3] The modern view, however, is that what would not be recognized as "due process of law" by a sister State is not entitled to any better recognition where the original suit is brought, and that service of process which is not reasonable, or is contrary to the principle of natural justice, which forbids condemnation without an opportunity to be heard, is not good anywhere.[4]

From the very nature of a body corporate, service of process cannot be personal, but it must be served on a proper officer or agent, so that it may through him come to the knowledge of the corporation. Where the foreign corporation does business in this State, but fails to appoint an agent under the statute, the agent who transacts its business here can safely be expected to transmit the process to headquarters. But it is another question when personal judgment is sought by serving process on a mere *servant* or *employee*, who by reason of ignorance or heedlessness would be quite likely not to apprehend the purpose of such service, and therefore neglect it.

In 23 L. R. A. 490 will be found a note citing a number of cases in which the question arose whether the agent served was such an agent as is contemplated by law. No statute, except our own, has been found which authorizes service on a mere employee.

J. BALDWIN RANSON.

Staunton, Va.

[1] 172 U. S. 672. [2] 106 U. S. 350. [3] 6 Thompson on Corp. 8039.
[4] See note to Pinney *v.* Providence L. & I. Co., 50 L. R. A. 580.